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FACSIMILE TRANSMITTAL May 23, 2008

To: Ravalli County Board of County Commissioners
Fax Number: 375-6507
From: Katy Hartney, Legal Assistant to William K. VanCanagan, Esq. *KSTB*
Re: Morado Mountain Estates Variance
File No. 19793.001

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Message: Ravalli County Board of County Commissioners~
Please find attached correspondence of today's date from Mr. VanCanagan regarding Morado Mountain Estates Variance.
Thank you.

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May 23, 2008

**VIA FACSIMILE [375-6731] and Regular
First Class Mail**

Mr. George Corn, Esq.
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Hamilton, Montana 59840-2853

**Via Facsimile [375-6507] and Regular First
Class Mail**

Ravalli County Board of County
Commissioners
215 S. 4th Street, Suite A
Hamilton, Montana 59840

Re: Morado Mountain Estates Variance
Our File No.: 19793.001

Dear Mr. George Corn and the Ravalli County Board of County Commissioners:

The purpose of this correspondence is twofold. First, it is necessary to respond further to questions recently directed at Mr. Ohnstad and Matt Ulberg, and second, to set forth additional enhancements generously proposed by Ms. Dykeman and Mr. Wilson.

Given the scope and legal character of many of the questions posed to the applicant, I thought it best to address this correspondence to both Mr. Corn and the Commissioners.

With respect to the Commission's numerous inquiries relating to Eastside Highway, its maintenance and traffic volume, I remind the Commission that such data is not an applicant's responsibility to submit under the Montana Subdivision and Platting Act or the Ravalli County Subdivision Regulations (the "Regulations"). Specifically, § 76-3-504 MCA does not contemplate that subdivision applicants would be responsible for state highways in any fashion, whether by way of submitting information or contributions for improvements. No provision of the Regulations requires any applicant to submit traffic analyses related to state highways, and certainly no provision of the MPSA authorizes the any county to demand mitigation from an applicant for non-county impacts.

Accordingly, where the Regulations address traffic analysis at all, it is in the form of a traffic impact analysis, required in certain circumstances under 3-1-5(xxxvi)(A)(1) which states:

"A traffic impact analysis, as described in this section, shall be prepared and submitted along with the preliminary plat application when the

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proposed development of six or more lots, as identified in the subdivision plat, has the potential to generate greater than 25% of the current traffic volume on any county-maintained road(s), or changes in the functional classification of any road, utilized for access to the subdivision." Emphasis added.

Thus the plain language of the Regulations contemplates further traffic analysis when there is a certain threshold impact to county roads. This is proper since the Commission's domain is Ravalli County, not the State of Montana. In this case, the County expert, Mr. Ohnstad explained why a traffic impact analysis of Eight Mile Creek Road was not warranted. As stated above, the County has no authority to require analysis of state highways from local subdivision applicants.

Nonetheless, the applicants are willing to respond as best they can to the Commissioners' questions because the County Road and Bridge Department, Planning Department, and Attorneys Office have worked diligently and in good faith to reach this creative, collaborative solution to a County road in severe disrepair.

Next, the Commission's question which asked, "What liability does the county incur for granting a variance for safety features/standards below what is called for in our subdivision regulations?" indicates that the Commission woefully misconceives the nature of the variance request as well as the scheme of the AASHTO Guidelines.

By way of further explanation, the Regulations require the applicants to bring Eight Mile Creek Road "to county standards for new construction." 5-4-5(b). Ravalli County relies on the AASHTO Guidelines so the variance request is simply to adhere to the AASHTO guideline for existing construction rather than new construction. In other words, standards for both "new" and "existing" construction are by definition and necessarily fully AASHTO compliant and as such neither poses a safety risk.

As Mr. Ulberg explained, AASHTO does not require application of "new" construction standards when existing roads are being improved. Quite the contrary, AASHTO specifically states that improvements and repairs to existing roads should adhere to the AASHTO guidelines for "existing" roads.

That is precisely why Mr. Ohnstad explained numerous times that the word "new" should not have been used in the Regulations.

In summary, while if granted the improvements will vary from the Regulations since the improvements will be at the "existing construction" standard rather than the "new construction" standard, that difference is not one of safety. AASHTO contains design standards, all of which account for safety. The "new" standard is meant to apply to new roads, and the "existing" standard is meant to apply to existing roads. Quite reasonably then, the applicants have requested to improve an existing road to AASHTO standards for existing roads.

Again, it cannot be over emphasized that the difference between the Regulations and the variance request is the difference between "new" and "existing" AASHTO designs, and the

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difference between new and existing AASHTO designs relates to the kind of road, not to the relative safety of the respective standards.

Furthermore, the County's potential liability in this matter will not result from the granting of the variance but from its failure to grant the variance. There was uncontroverted testimony from residents along Eight Mile Creek Road and from the County that the road's condition is a threat to public safety. There was also testimony that the County would not undertake an improvement as significant or as long-lasting as that proposed by Ms. Dykeman and Mr. Wilson.

As you know, the County's broad authority granted to it according to its police power demands that the county act to ensure the safety, health, and welfare of the citizens of Ravalli County. If the County nonetheless construes its own Regulations to disserve the public welfare, that decision is certain to be viewed as arbitrary, irrational, and ultra vires its authority. To the extent that the Commissioners knowingly refuse improvements that exceed the scope and character of any improvement the County could implement, the County's irrational refusal increases its legal exposure.

Finally, after reflecting on the comments and concerns of the Commissioners, the applicants decided to offer the following further mitigation or enhancements:

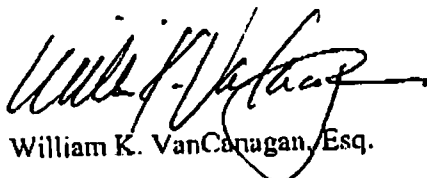
1. To forego any pro rata reimbursement;
2. To waive right to protest an RSID for future development;
3. To install stop signs on the 14 private cross streets intersecting Eight Mile Creek Road; and,
4. To install warning signs along Eight Mile Creek Road warning motorists to watch for pedestrians.

As my clients and various Departments within Ravalli County have expended significant time and resources crafting this advantageous solution to the bad conditions on Eight Mile Creek Road, I look forward to your continued good faith cooperation and impartial review of the applications.

If you have any questions or desire any further information, please do not hesitate to contact me.

Sincerely,

DATSOPOULOS, MacDONALD & LIND, P.C.



William K. VanCanagan, Esq.

Datsopoulos, MacDonald & Lind, P.C.

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WKV/jem/ksh

cc: Ms. Karen Hughes, Director (Via e-mail)
Ms. Stacey Dykeman (Via e-mail)
Mr. Terry Forest (Via e-mail)
Ms. Joslin Monahan (Via e-mail)

\\Dykeman, Stacey 19793\Morado Mountain Estates Subdivision 001\Correspondence\BCC ltr 052208.doc